APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed July 15, 2003]

No. 01-41222

RONALD H. MANNING,
Plaintiff-Appellant,

v.

CHEVRON CHEMICAL COMPANY LLC,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Texas, Beaumont.

ON PETITION FOR REHEARING EN BANC

Before: HIGGINBOTHAM, EMILIO M. GARZA, and DENNIS, *Circuit Judges.*

PER CURIAM:

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

Emilio M. Garza
United States Circuit Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed June 13, 2003]

No. 01-41222

RONALD H. MANNING,
Plaintiff-Appellant,

versus

CHEVRONCHEMICAL COMPANY LLC,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Texas

OPINION

Before: HIGGINBOTHAM, EMILIO M. GARZA, and DENNIS, *Circuit Judges*.

Ronald H. Manning ("Manning") appeals the district court's grant of summary judgment in favor of Chevron Chemical Company, LLC ("Chevron"). Manning filed this employment discrimination lawsuit against Chevron, claiming that the company discriminated against him on the basis of his race, gender, and disability, and retaliated against him for seeking redress for these alleged wrongs, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* ("Title VII"), and the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.* ("ADA"). We

conclude that the district court properly granted Chevron's motion for summary judgment, and therefore affirm.

I

For approximately 23 years, *Manning*, an African American male, worked at a Chevron facility in Orange, Texas. In 1998, *Manning* applied for a promotion to the position of Technician 1 ("T-1"). Chevron decided not to promote *Manning*, and instead selected Peggy Williams (an African American female) and Fred Noyes (a Caucasian male) for the two open positions.

On October 26, 1998, after learning that he was not selected for a T-1 position, *Manning* filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"), alleging race and gender discrimination as well as retaliation.[1] Manning did not check the box labeled "disability" (for an allegation of disability discrimination) on that original charge.

Manning subsequently consulted an attorney about his case. The attorney noticed that *Manning* had a tendency to stutter as he spoke, and suggested that *Manning* might also have a disability discrimination claim. At his counsel's suggestion, on November 20, 1999, *Manning* amended his charge of discrimination to include an ADA claim. He then filed the instant lawsuit, raising race, gender, disability, and retaliation claims for Chevron's failure to promote him to a T-1 position.

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[1] *Manning* explained the basis for the retaliation claim when he filed his federal complaint: Manning had previously brought employment discrimination actions against Chevron, and he believed that the company failed to promote him to retaliate against him for having filed those prior lawsuits.

A few months later, Chevron began reorganizing its workforce[2] and informed *Manning* that he was among the employees who might be terminated during this process. Chevron offered *Manning* (along with many of the other employees facing layoff) the opportunity to apply for positions at other Chevron facilities. *Manning* subsequently applied for transfers to the Cedar Bayou Chemical Plant and the Kingwood technology facility. *Manning* did not obtain a position at either location. As a result, he amended his federal complaint against Chevron to include disability discrimination and retaliation claims for the company's failure to transfer him.

Chevron offered most of the employees facing layoff a severance package valued at approximately $45,000.00. Chevron informed *Manning* that, in order to receive the package, he would have to sign a release form, waiving all claims against the company. *Manning* refused to sign the release and did not receive any severance pay. *Manning* alleged in his federal lawsuit that Chevron's failure to provide him with the severance package was another instance of retaliation.

The district court found that *Manning* had failed to raise a genuine issue of material fact as to any of his race, gender, or retaliation claims. The court also concluded that *Manning's* disability discrimination claim regarding the T-1 position was time-barred, because *Manning* had failed to file a timely charge of disability discrimination with the EEOC. Therefore, the district court granted Chevron's motion for summary judgment.

On appeal, *Manning* contends that (1) his ADA claim regarding the T-1 position is not time-barred; (2) even if that first ADA claim is time-barred, his additional disability dis-

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[2] The reorganization was precipitated by a merger of Chevron and Phillips Petroleum.

crimination claim (regarding the Cedar Bayou transfer positions) is subject to equitable tolling; (3) Chevron engaged in race and gender discrimination when it failed to promote *Manning* to the T-1 position; and (4) Chevron's failure to transfer him and its refusal to award him the severance package constituted retaliation. We address each claim in turn.

II

We review the district court's ruling on a motion for summary judgment de novo, applying the same legal standard as the district court. *Wyatt v. Hunt Plywood Co.*, 297 F.3d 405, 408 (5th Cir. 2002). Summary judgment should be granted only when there is "no genuine issue as to any material fact [ ]" FED. R. CIV. P. 56(c); *Wyatt*, 297 F.3d at 408-09. An issue of fact is material only "if its resolution could affect the outcome of the action." *Wyatt*, 297 F.3d at 409.

In determining whether there is a dispute as to any material fact, we consider all of the evidence in the record, but we do not make credibility determinations or weigh the evidence. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150, 147 L. Ed. 2d 105, 120 S. Ct. 2097 (2000). Instead, we "draw all reasonable inferences in favor of the nonmoving party[.]" *Id.*; *Wyatt*, 297 F.3d at 409. If we determine, after giving credence to the facts as presented by the nonmoving party, that "the moving party is entitled to a judgment as a matter of law," we affirm the grant of summary judgment. FED. R. CIV. P. 56(c). The district court found that *Manning's* disability discrimination claim regarding the T-1 position was untimely. As the district court recognized, under the ADA, *Manning* had to file a charge of discrimination within 300 days of the alleged discriminatory act. *See* 42 U.S.C. § 12117 (incorporating 42 U.S.C. § 2000e-5(e)). The limitations period began to run from the time *Manning* "[knew] or reasonably should have known that the challenged act [had] occurred." *Vadie v. Miss. State Univ.*, 218 F.3d 365, 371 (5th Cir. 2000).

Manning learned that he did not receive the T-1 position on June 16, 1998. He had 300 days from that date (or until April 12, 1999) to file his charge of discrimination. *Manning* did file a timely charge on October 26, 1998, but that charge alleged only race, gender, and retaliation claims. *Manning* did not amend his charge to include an ADA claim until November 20, 1999, after the expiration of the 300-day period. As a result, the district court concluded that his disability discrimination claim was untimely.

Manning argues that the district court erred in holding that his ADA claim was time-barred. He contends that the court should have found that his amended charge, alleging disability discrimination, "relates back" to the date of his (timely filed) original charge.

As *Manning* appears to recognize, EEOC regulations allow a claimant to amend a charge of discrimination to "cure technical defects or omissions" or to "clarify and amplify" the initial allegations. 29 C.F.R. § 1601.12(b). If the amendments involve acts that "relate[] to or grow[] out of the subject matter of the original charge," the amendments will "relate back to the date the charge was first received." *Id.*; *see* 29 C.F.R. § 1626.8(c). *Manning* contends that his amendment, which added a disability discrimination claim, is sufficiently related to the subject matter of his original charge (*i.e.*, his race, gender, and retaliation claims) to "relate back" to the date of his original charge. As a result, he claims, his disability discrimination claim should be deemed timely.

Generally, amendments that raise a new legal theory do not "relate back" to an original charge of discrimination. *See, e.g.*, *EEOC v. Miss. Coll.*, 626 F.2d 477, 483-84 (5th Cir. 1980) (observing that "because [the claimant's] allegations of racial discrimination do not relate to or grow out of the allegations of sex discrimination advanced in the original charge, that aspect of the amended charge does not relate back to the time of filing of [the] original charge"); *Simms v.*

Oklahoma ex rel. Dep't of Mental Health & Substance Abuse Servs., 165 F.3d 1321, 1327 (10th Cir. 1999) (holding that the plaintiff's amended charge did not relate back under § 1601.12(b), because the original charge alleged only race discrimination, while the amended charge included "a new theory of recovery"—retaliation); *Fairchild v. Forma Scientific, Inc.*, 147 F.3d 567, 575 (7th Cir. 1998) ("An untimely amendment that alleges an entirely new theory of recovery does not relate back to a timely filed original charge."); *id.* at 576 (concluding that an amendment containing a claim of disability discrimination did not relate back to the original charge, which alleged age discrimination); *Evans v. Tech. Applications & Serv. Co.*, 80 F.3d 954, 963-64 (4th Cir. 1996) (holding that the plaintiff's age discrimination claim did not relate back to the originally filed charge of sex discrimination).

This rule has an important policy justification. One of the central purposes of the employment discrimination charge is to put employers on notice of "the existence and nature of the charges against them." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 77, 80 L. Ed. 2d 41, 104 S. Ct. 1621 (1984). In order to adequately notify employers about the nature of the charges against them, employees must inform their employers from the outset about their claims of discrimination. *See Simms*, 165 F.3d at 1327 ("Prohibiting late amendments that include entirely new theories of recovery furthers the goals of the statutory filing period—giving the employer notice and providing opportunity for administrative investigation and conciliation."); *Fairchild*, 147 F.3d at 575 ("The charge filing requirement ensures that the employer has adequate notice of the charges and promotes conciliation at the administrative level.").

Despite the important policy justifications for requiring employees to assert all of their claims in the original charge, we have identified one very narrow exception to this general

rule. We have held that an amendment, even one that alleges a new theory of recovery, can relate back to the date of the original charge when the facts supporting both the amendment and the original charge are essentially the same. See *Hornsby v. Conoco, Inc.*, 777 F.2d 243, 247 (5th Cir. 1985) (concluding that the plaintiff's amendment, which alleged gender discrimination, related back to the age and retaliation claims in her original charge, because the factual allegations in the original charge included a reference to gender discrimination); *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 462-64 (5th Cir. 1970) (concluding that the plaintiff could add a national origin discrimination claim to the gender discrimination claim in her original charge).

Manning contends that his case fits under our exception. He asserts that, when he amended his original charge to include a disability discrimination claim, he "did not allege new and/or additional facts to support his amended disability claim." *Manning* appears to assume that, under our cases, an employee can amend his charge of discrimination at any point to allege a new theory of recovery, as long as the employee does not allege any new facts in the amended charge.

Manning misunderstands the import of our precedent. The issue is not whether the employee adds any facts when he amends his charge of discrimination. Instead, the question is whether the employee already included sufficient facts in his original complaint to put the employer on notice that the employee might have additional allegations of discrimination. *See Hornsby*, 777 F.2d at 247 (concluding that the plaintiff could add a claim of gender discrimination because the facts in her original charge supported such a claim, but holding that the plaintiff could not amend her complaint to include a claim of sexual harassment, because the facts alleged in the original charge did not support such a claim); see also *Sanchez, 431 F.2d at 462* ("The crucial element of a charge of discrimination is the factual statement contained therein."). In this

case, *Manning* failed to allege sufficient facts in his original charge to provide Chevron with the requisite notice. Therefore, we hold that *Manning's* amended charge, alleging disability discrimination, does not relate back to his original charge, which raised different theories of recovery.

As *Manning* acknowledges, our conclusion that *Manning's* ADA claim regarding the T-1 position was untimely "adversely affects" his additional disability discrimination claim. *Manning* was informed on July 19, 2000, that he would not be transferred to any position at the Cedar Bayou facility. He then had 300 days (or until May 15, 2001) to file a charge of discrimination. *Manning*, however, never filed any charge of discrimination with respect to these transfer positions. *Manning* believed that a new charge of discrimination was unnecessary, because (in his view) his ADA claims were already properly before the district court. However, as we have concluded, *Manning* did not file a timely charge of disability discrimination with respect to the T-1 position. Therefore, in order to bring a disability discrimination claim with respect to the transfer positions, he should have filed a new charge of discrimination. Because he failed to do so, his additional ADA claim is also time-barred.

Manning concedes that his disability discrimination claim regarding the Cedar Bayou facility was untimely. He argues, however, that we should apply the doctrine of equitable tolling to this claim.

As *Manning* asserts, the limitations period on filing a charge of employment discrimination "is subject to equitable doctrines such as tolling or estoppel." *Nat'l RR Passenger Corp. v. Morgan*, 536 U.S. 101, 113, 153 L. Ed. 2d 106, 122 S. Ct. 2061 (2002); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393, 71 L. Ed. 2d 234, 102 S. Ct. 1127 (1982). However, these equitable doctrines "are to be applied sparingly." *Morgan*, 536 U.S. at 113. The party who invokes equitable tolling bears the burden of demonstrating that it

applies in his case. *Ramirez v. City of San Antonio*, 312 F.3d 178, 183 (5th Cir. 2002).

We have identified three potential bases for equitable tolling: (1) the pendency of a suit between the same parties in the wrong forum; (2) the plaintiff's lack of awareness of the facts supporting his claim because of the defendant's intentional concealment of them; and (3) the EEOC's misleading the plaintiff about his rights. *Blumberg v. HCA Mgmt. Co.*, 848 F.2d 642, 644 (5th Cir. 1988). *Manning* asserts that all three bases for equitable tolling apply in his case.

Manning first argues that equitable tolling should apply because his case has been pending in the wrong forum. *Manning* appears to assert that, because he brought his claim in an untimely manner, the district court was the "wrong" forum for those claims. Evidently, *Manning* misunderstands the meaning of the first factor justifying equitable tolling. As we observed in *Chappell v. Emco Mach. Works Co.*, 601 F.2d 1295 (5th Cir. 1979), equitable tolling is appropriate in the rare case when the parties have been litigating an action in state court, but they later discover that they chose the wrong forum under state law. *Id.* at 1302. This first basis for equitable tolling does not apply in *Manning's* case.

Manning next asserts that equitable tolling is appropriate because Chevron concealed the facts supporting his ADA claim. *Manning* suggests that he was unaware that his alleged disability (his stuttering) might have affected Chevron's decision with respect to the Cedar Bayou positions until the company released the notes from *Manning's* interview for the positions. These notes contained negative comments about *Manning's* speech and communication skills. *Manning* claims that, until these notes were released in November or December of 2000, he had no way of knowing that he might have been discriminated against based on his disability. Thus, *Manning* suggests, Chevron misled him about a potential ADA claim.

Manning's argument lacks merit. We equitably toll a limitations period only when the employer's affirmative acts mislead the employee and induce him not to act within the limitations period. *Ramirez*, 312 F.3d at 184; *Tyler v. Union Oil Co. of Cal.*, 304 F.3d 379, 391 (5th Cir. 2002). In this case, *Manning* has not alleged that Chevron took any action that might have induced him not to file a charge of discrimination. By his own admission, *Manning* failed to file a new charge with the EEOC solely because he believed his disability discrimination claims were already properly before the district court.

That leads us to *Manning's* assertion that the third basis for equitable tolling applies in his case: the EEOC misled him about the nature of his rights. *Manning* contends that, by issuing him a new right to sue letter (containing an ADA claim relating to the T-1 position), the EEOC led *Manning* to believe that he could properly bring his ADA claims. Once again, *Manning* misunderstands our stated basis for equitable tolling. We apply equitable tolling when an employee seeks information from the EEOC, and the organization gives the individual incorrect information that leads the individual to file an untimely charge. *See Ramirez*, 312 F.3d at 184. In this case, *Manning* does not allege that the EEOC gave him any incorrect information with respect to the proper time for filing his charge. Therefore, the third basis for equitable tolling does not apply in this case. *Manning's* disability discrimination claims are time-barred.[3]

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[3] *Manning* suggests that his claims might be timely under a continuing violation theory. *Manning* fails, however, to adequately brief this issue, so we need not address it. *See Kane Enter. v. MacGregor (USA) Inc.*, 322 F.3d 371, 376 n.3 (5th Cir. 2003) (observing that issues inadequately briefed are deemed waived).

III

Manning alleges that Chevron discriminated against him on the basis of race and gender when it failed to promote him to a T-1 position. As we have observed, Chevron instead selected Peggy Williams (an African American female) and Fred Noyes (a Caucasian male). *Manning* contends that Chevron discriminated against him as an African American male.

Manning attempts to prove his race /gender discrimination claim by indirect (circumstantial) evidence. As a result, we apply the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973). Under this three-part scheme, a plaintiff must first present a prima facie case of discrimination. A plaintiff satisfies this initial burden by showing that (1) he belongs to a protected group; (2) he was qualified for the position sought; (3) he suffered an adverse employment action; and (4) he was replaced by someone outside the protected class. *Price v. Fed. Express Corp.*, 283 F.3d 715, 720 (5th Cir. 2002). If the plaintiff can present a prima facie case, the burden shifts to the defendant to rebut the plaintiff's case by demonstrating a "legitimate, nondiscriminatory justification for its actions." *Id.* If the defendant offers such a justification, the burden shifts back to the plaintiff, who can attempt to show that the defendant's proffered reason is simply a pretext for discrimination. *Id.*

Both parties appear to agree that *Manning* has demonstrated a prima facie case of discrimination. Therefore, we proceed to the second two parts of the analysis.

Manning argues that Chevron has failed to articulate a legitimate, non-discriminatory reason for its decision not to promote him. As *Manning* observes, Chevron claimed that it selected the "best qualified" candidates for the T-1 position. *Manning* appears to argue that this declaration was not

sufficient. He claims that Chevron had to state the "specific reason [he] was denied [the] promotion." *Manning* appears to argue that Chevron was required to explicitly state that it chose Williams and Noyes because they were more qualified than *Manning*, rather than simply state that they were the "best qualified" candidates. We disagree. Chevron's statement that it chose the "best qualified" candidates clearly implies that it selected Williams and Noyes because they were better qualified than *Manning*. Chevron's explanation constitutes a legitimate, non-discriminatory justification for its failure to promote *Manning*. *See id.* at 721 n.2.

Because Chevron provided a legitimate, non-discriminatory justification, the burden shifted back to *Manning* to show that Chevron's asserted reason was a pretext for discrimination. In order to demonstrate that Chevron's asserted justification (that Williams and Noyes were more qualified) was pretext, *Manning* can attempt to show that he was "clearly better qualified" for the T-1 position. *Id. at 723*; *Deines v. Tex. Dep't of Protective & Regulatory Servs.*, 164 F.3d 277, 280 (5th Cir. 1999).[4] *Manning* attempts to show that he was better qualified than Williams and Noyes by pointing to his educational background, his various technical and analytical skills, and his asserted good performance during the interview process. The facts presented by *Manning* fail, however, to suggest that

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[4] *Manning* suggests that we should not apply our "clearly more qualified" standard, because, he asserts, it is inconsistent with the Supreme Court's decision in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 L. Ed. 2d 105, 120 S. Ct. 2097 (2000). *Manning* fails to explain (and we fail to see) how the Court's decision in Reeves undermines our cases articulating the "clearly more qualified" standard. In any event, *Price v. Federal Express Corp.*, 283 F.3d 715 (5th Cir. 2002), a post-Reeves decision, makes clear that the standard still applies. See *id.* at 723.

he was clearly better qualified than the selected applicants.[5] Thus, *Manning* cannot demonstrate pretext in this manner.

Second, *Manning* contends that Chevron's assertion (that Williams and Noyes were the most qualified candidates) must be pretext because Chevron's hiring criteria were largely subjective. The mere fact that an employer uses subjective criteria is not, however, sufficient evidence of pretext. See *Millbrook v. IBP, Inc.*, 280 F.3d 1169, 1176 (7th Cir. 2002) (observing that "'absent evidence that subjective hiring criteria were used as a mask for discrimination, the fact that an employer based a hiring or promotion decision on purely subjective criteria will rarely, if ever, prove pretext under Title VII'") (quoting *Denney v. City of Albany*, 247 F.3d 1172, 1185 (11th Cir. 2001)).

Third, *Manning* attempts to show pretext by pointing to Chevron's alleged failure to promote African American males to managerial or supervisory positions. The evidence he provides, however, does not demonstrate pretext. *See Sessions v. Rusk State Hosp.*, 648 F.2d 1066, 1071 (5th Cir. Unit A Jun. 1981) ("The statistical evidence buttresses [the plaintiff's] prima facie case, but it does not demonstrate that the reason advanced for failure to promote him lacked either substance or credibility.").

Finally, *Manning* relies on a discriminatory statement allegedly made by Wanda Weatherford ("Weatherford"), a Chevron employee who participated in the decisionmaking process for the T-1 positions. *Manning* asserts that Weatherford once used the word "nigger" in his presence. We have held that, in order for comments in the workplace to provide

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[5] Indeed, it is not even apparent that *Manning* himself believes he was clearly better qualified than both Williams and Noyes. When questioned about Williams' qualifications, *Manning* stated that she was a "tremendous technician," suggesting that he believed Williams to be at least equally qualified for the T-1 position.

sufficient evidence of discrimination, they must be (1) related to the protected class of which the plaintiff is a member; (2) proximate in time to the employment action; (3) made by an individual with authority over the employment decision at issue; and (4) related to the employment decision at issue. *Wallace v. Methodist Hosp. Sys.*, 271 F.3d 212, 222 (5th Cir. 2001). *Manning* cannot meet the second and fourth requirements of that test. *Manning* claims that Weatherford made the derogatory comment prior to 1994, at least four years before he applied for the T-1 position. *Manning* fails to allege either that the comment was made at (or around) the time of the promotion decision or that the comment related in any way to that employment decision. As a result, *Manning* fails to demonstrate pretext in this manner.

None of the other evidence presented by *Manning* creates a genuine issue of material fact regarding pretext. We thus conclude that the district court did not err in granting summary judgment to Chevron on this claim of race and gender discrimination.

IV

Manning contends that Chevron retaliated against him when it failed to transfer him to the Cedar Bayou and Kingwood facilities and when it refused to award him a $45,000 severance package. Title VII prohibits an employer from retaliating against an employee because that employee has complained about acts of discrimination at work. *See 42 U.S.C.* § 2000e-3(a) ("It shall be an unlawful employment practice . . . to discriminate against any individual . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.").

We have stated that, in order to establish a prima facie case of retaliation, the plaintiff must show (1) that he engaged in

an activity protected by Title VII; (2) that an adverse employment action occurred; and (3) that there is a causal link between the protected activity and the adverse employment action. *Fierros v. Tex. Dep't of Health*, 274 F.3d 187, 191 (5th Cir. 2001).

Chevron argues that *Manning* cannot establish a prima facie case for the transfer positions because he cannot satisfy the third requirement: demonstrating a "causal link" between his protected activity and the adverse employment action. Chevron asserts that the supervisors who made the decisions regarding the lateral transfer positions were unaware that *Manning* had previously filed employment discrimination actions against the company. Chevron contends that, because these individuals were unaware of *Manning's* lawsuits, they could not have retaliated against *Manning* for filing the lawsuits.

We have determined that, in order to establish the causation prong of a retaliation claim, the employee should demonstrate that the employer knew about the employee's protected activity. *See Medina v. Ramsey Steel Co.*, 238 F.3d 674, 684 (5th Cir. 2001); *see also Chaney v. New Orleans Pub. Facility Mgmt., Inc.*, 179 F.3d 164, 168 (5th Cir. 1999) ("If an employer is unaware of an employee's protected conduct at the time of the adverse employment action, the employer plainly could not have retaliated against the employee based on that conduct.").[6]

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[6] *Manning* appears to contend that, in order to establish a prima facie case, he need not offer evidence that the Cedar Bayou or Kingwood decisionmakers were aware of any of his prior lawsuits. As *Manning* observes, "at this threshold stage, the standard for satisfying the causation element is 'much less stringent' than a 'but for' causation standard." *Fierros*, 274 F.3d at 191. Although the plaintiff's burden at the prima facie stage is not onerous, the plaintiff must produce at least some evidence that the decisionmakers had knowledge of his protected activity. *See Medina*, 238 F.3d at 684. If the decisionmakers were completely

To show that the decisionmakers at the Cedar Bayou and Kingwood facilities were aware of his lawsuits, *Manning* offers only an ambiguous statement by John Swansiger ("Swansiger"), who apparently was a supervisor at the Chevron facility where *Manning* worked. Swansiger was the individual who informed *Manning* that he was not selected for any of the lateral transfer positions. During this conversation, after Swansiger told *Manning* that he had not received a Cedar Bayou position, *Manning* asked about the Kingwood facility. According to *Manning*, Swansiger replied, "No, they don't want that." According to *Manning*, although he asked Swansiger about the statement, Swansiger never explained the meaning of the comment, *Manning* ultimately concluded that Swansiger was referring to *Manning's* employment discrimination actions.

We conclude, however, that Swansiger's statement does not indicate that any of the decisionmakers at the Cedar Bayou or Kingwood facilities knew about *Manning's* previous lawsuits against Chevron. As a result, *Manning* fails to demonstrate a causal link between his protected activity and Chevron's failure to transfer him. Thus, *Manning* cannot establish a prima facie case of retaliation for the lateral transfer positions.

Finally, *Manning* claims that Chevron retaliated against him by failing to award him a $45,000 severance package. This package was offered to the Chevron employees who lost their jobs during the company reorganization of 2000. In order to receive the package, *Manning* had to sign a release form, waiving all claims against the company. *Manning* was unwilling to do so, because Chevron informed him that signing the release would require him to abandon the lawsuit

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unaware of the plaintiff's protected activity, then it could not be said (even as an initial matter) that the decisionmakers might have been retaliating against the plaintiff for having engaged in that activity.

he had already filed. *Manning* contends that Chevron's failure to award him the severance package constituted retaliation.

Again, *Manning* must show that there was a causal connection between Chevron's refusal to award him the severance package and his protected activity. *Manning*, however, fails to demonstrate that causal link. The record shows that Chevron required all employees to sign the same release form before they could receive the severance package. Thus, when Chevron refused to award *Manning* a severance package, it was simply applying that general policy to *Manning*, not retaliating against him for bringing an action against the company. *See Corneveaux v. CUNA Mut. Ins. Group*, 76 F.3d 1498, 1508 (3rd Cir. 1996) *(concluding that the plaintiff failed to prove the causal link required for a retaliation claim, because the defendant employer "required completion of a form waiving all claims against [the employer] from all employees prior to disbursing the [benefits]") (emphasis added).*

Manning has not demonstrated that the district court erred in granting Chevron's motion for summary judgment. As a result, the judgment of the district court is AFFIRMED.

DENNIS, *Circuit Judge*, specially concurring:

While I agree with much of the majority opinion, I write separately to express disagreement with the majority's statement in a footnote that *Price v. Federal Express Corp.*, 283 F.3d 715 (5th Cir. 2002), established that *Deines v. Texas Department of Protective & Regulatory Services*, 164 F.3d 277 (5th Cir. 1999), survived the Supreme Court's decision in *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133, 147 L. Ed. 2d 105, 120 S. Ct. 2097 (2000). I believe that this remains an open question that we must resolve in a future, appropriate case.

In Reeves the Supreme Court rejected prior Fifth Circuit jurisprudence holding that a plaintiff needed evidence beyond evidence showing that an employer's proffered non-discriminatory reason for an employment decision is false in order to establish a Title VII claim. Rather, a plaintiff's prima facie case combined with evidence that the employer's stated reasons are false can be sufficient grounds to support a verdict for a plaintiff. *Reeves*, 530 U.S. at 148.

Whether the "clearly better qualified" standard articulated in Deines is consistent with Reeves is unclear. While Deines could be read, in accordance with Reeves, to merely state the standard of proof required to establish that the employer's stated reasons are false, the opinion specifically denied that the test it applied did so. *See Deines*, 164 F.3d at 281. The opinion's stated purpose of describing the "quality" of evidence needed to establish the "ultimate fact" of intentional discrimination, *id.*, sounds suspiciously similar to the requirement of additional evidence of intentional discrimination beyond proof of falsity that the Supreme Court found inconsistent with Title VII in Reeves. And contrary to the majority's suggestion, our continued application of Deines in Price without analysis of whether Deines survived Reeves does not establish that Deines is still good law. Rather, it

merely shows that litigants in Price failed to properly raise the issue of Deines' vitality.

Thus, I believe that this court must one day confront whether Deines is still good law. This, however, is not that day, as *Manning* has introduced no relevant evidence suggesting that his employer's proffered explanation is false. Most of *Manning's* rebuttal evidence consists of conclusory assertions insufficient to withstand summary judgment. *Ramsey v. Henderson*, 286 F.3d 264, 269 (5th Cir. 2002). The remaining evidence consists of *Manning's* different educational background and additional years of experience in his current position, both of which Chevron has established were not criterion for the T-1 position. In fact, as the majority accurately explains, *Manning* has all but admitted that at least one of the people who received the job instead of him was as well qualified for the position as he was. Hence, I believe that we should affirm the district court's grant of summary judgment here without reaching the thorny question of whether the Deines' "clearly better qualified" standard remains good law.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

[Filed Sep. 7, 2001]

1:00-CV-143 (TH)
JURY

RONALD H. MANNING,
Plaintiff,

VS.

CHEVRON CHEMICAL COMPANY LLC,
Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR COMPLETE SUMMARY JUDGMENT

Before the Court is *Defendant's Opposed Motion for Complete Summary Judgment* (Doc. No. 77), *Plaintiff's Response to Defendant's Opposed Motion for Complete Summary Judgment* (Doc. No. 93), *Defendant Chevron Chemical Company LLC's Reply to Plaintiff's Response to Defendant's Motion for Summary Judgment* (Doc. No. 96), and *Plaintiff's Supplemental Response to Defendant's Motion for Complete Summary Judgment* (Doc. No. 100). The Court heard arguments on Defendant's Motion for Summary Judgment on June 14, 2001. At the close of the hearing, the Court ruled on certain issues raised by Defendant. Having considered the arguments of counsel, the papers submitted, the applicable law and the record in this case, the Court now

GRANTS Defendant's Opposed Motion for Complete Summary Judgment (Doc. No. 77) in its entirety.

I. BACKGROUND

Plaintiff Ronald Manning filed this lawsuit against Defendant Chevron Chemical Company, alleging three separate instances of employment discrimination and retaliation under Title VII and the American with Disabilities Act ("ADA"). Plaintiff, an African American male, was employed by Defendant from 1977 until his termination in 2000. The allegations by Plaintiff involve three different groups of decision-makers, at three different sites owned and operated by Defendant, at three different times. First, Plaintiff disputes the 1998 selection of an African American female and a Caucasian male for promotion, aguing that he was denied the promotion due to his (1) race/gender, (2) alleged disability (stuttering), and (3) two previous employment discrimination lawsuits he brought against Defendant. In the second and third action, Plaintiff contends that Defendant unlawfully retaliated against him by failing to award him positions at two other facilities during Defendant's year 2000 reduction-in-force and reorganization. In addition, Plaintiff filed claims against Defendant alleging disparate impact and hostile work environment.

Defendant moved for complete summary judgment, and Plaintiff responded. The Court heard arguments on Defendant's Motion for Summary Judgment on June 14, 2001. At the close of the hearing, the Court ruled on certain issues raised by Defendant. Specifically, the Court granted partial summary judgment: (1) as to all issues related to Plaintiff's disability discrimination claim; (2) as to all issues related to Plaintiff's hostile work environment claim; (3) as to all issues related to Plaintiff's disparate impact claim; and (4) as to all issues related to Plaintiff's retaliation claim. The Court now considers the remaining issues raised in Defendant's motion.

II. LEGAL STANDARD—MOTION FOR SUMMARY JUDGMENT

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. FED.R.CIV.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986). When a motion for summary judgment is made, the nonmoving party must set forth specific facts showing that there is no genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). Issues of material fact are "genuine" only if they require resolution by a trier of fact. *Id.* at 248, 106 S.Ct. at 2510. The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. Only disputes over facts that might affect the outcome of the lawsuit under governing law will preclude the entry of summary judgment. *Id.* at 247-48, 106 S.Ct. 2510. If the evidence is such that a reasonable fact-finder could find in favor of the nonmoving party, summary judgment should be granted. *Id.*; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

Procedurally, the party moving for summary judgment bears the initial burden of "informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrates the absence of a genuine issue of material fact." *Celotex Corp.*, 477 U.S. at 323, 106 S.Ct. at 2553. The burden then shifts to the nonmoving party to establish the existence of a genuine issue for trial. *Matsushita*, 475 U.S. at 585-87, 106 S.Ct. at 1355-56. The Court must accept the evidence of the nonmoving party and draw all justifiable inferences in favor of that party. *Id.* However, to meet its burden, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts," but instead, must "come

forward with 'specific facts showing that there is a genuine issue for trial.'" *Id.* (quoting FED.R.CIV.P. 56(e)).

III. DISCUSSION

To survive a motion for summary judgment in a race/gender promotion discrimination case, Plaintiff must make an initial *prima facie* showing of such discrimination. That is, Plaintiff must show (1) that he belongs to a racial minority, (2) that he was qualified for the position for which Defendant was seeking applicants, (3) that, despite his qualifications, he was rejected, and (4) that the position was filled with candidates who were not African American males. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). If Plaintiff satisfies his burden and makes a *prima facie* case of discrimination, the burden then shifts to Defendant to "articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Id.* If Defendant successfully discharges its burden, then Plaintiff must be afforded a fair opportunity to show that Defendant's reason for rejection was in fact a pretext for discrimination. *See id.* at 804.

Plaintiff asserts that Defendant did not promote him to the position of Molding Group T-1 or Pipe/PDG Group T-1 because he is an African-American male, suffers from an alleged disability, and filed prior complaints against Defendant. Further, Plaintiff contends that Defendant denied him lateral transfer positions at its Cedar Bayou and Kingwood facilities in retaliation for prior claims. To support his contention, Plaintiff relies on his (1) job tenure with Defendant, (2) subjective belief he is better qualified because he has a college degree, and (3) subjective belief that Defendant's Technology Center in Orange, Texas discriminates against African-American males.

In *Bodenheimer v. PPG Industries*, the Fifth Circuit held that tenure does not equate to superior qualifications. *See* 5

F.3d 955, 959 (5th Cir. 1993). Further, the law is clear that subjective belief does not constitute competent evidence of discrimination. *See Price v. Marathon Cheese Corp.*, 119 F.3d 330, 337 (5th Cir. 1997). In its motion and at the hearing, Defendant submitted evidence that it did not select Plaintiff for the disputed promotional opportunities because it determined that Peggy Williams (African-American female) and Fred Noyes (Caucasian male) were the best qualified candidates for the position. For Plaintiff to take a promotion claim to the jury, he must present "evidence that he was clearly better qualified than [other] employees who were selected for the position at issue. . . ." *Deines v. Texas Dep't of Protective & Regulatory Serv.*, 164 F.3d 277, 280 (5th Cir. 1999). Furthermore, Plaintiff must show a "significant disparity" in qualification sufficient to "jump off the page and slap us in the face." *Scott v. University of Mississippi*, 148 F.3d 493, 508 (5th Cir. 1998). Plaintiff has not made such a showing. The Court does not dispute that Plaintiff can make a *prima facie* case for race/gender discrimination. However, the Court FINDS that Plaintiff has not satisfied his burden of presenting evidence to overcome Defendant's legitimate, nondiscriminatory reasons for its selections.

To proceed with a disability discrimination claim, Plaintiff must first establish that he timely filed a charge of disability discrimination with the Equal Employment Opportunity Commission ("EEOC"). *See Rogers v. International Marine Terminals*, 87 F.3d 755, 758 (5th Cir. 1996.) That is, Plaintiff must file a charge of discrimination within 300 days of the "alleged unlawful employment practice." 42 U.S.C. § 2000e-5(e); 42 U.S.C. § 12117(a). Failure to timely file a charge of discrimination renders the charge untimely and the claimant is precluded from bringing an action with respect to the untimely charge. *See, e.g., Koelsch v. Beltone Elecs. Corp.*, 46 F.3d 705, 707 (7th Cir. 1995).

To timely file a charge of disability discrimination relating to the June 16, 1998 promotions, the deadline for Plaintiff's charge of discrimination was April 12, 1999. 42 U.S.C. § 12117(a). It is undisputed that Plaintiff did not file a charge of disability discrimination until November 20, 1999. That Plaintiff filed a race and gender discrimination charge on October 20, 1998, and "amended" the same on November 20, 1999, does not salvage his disability discrimination claim because amendments that add entirely new and distinct claims do not relate back to the original filing date. *See e.g., Hornsby v. Conoco, Inc.*, 777 F.2d 243, 247-48 (5th Cir. 1985). Thus, the Court FINDS that Plaintiff's disability discrimination claim is time-barred, and Defendant is entitled to summary judgment as a matter of law.

For Plaintiff to demonstrate a *prima facie* claim for retaliation, he must prove (1) that he engaged in a protected activity; (2) an adverse employment action occurred; and (3) a causal connection exists between the participation in the activity and the adverse employment action. *See Webb v. Cardiothoracic Surgery Assocs. P.A.*, 139 F.3d 532, 540 (5th Cir. 1998). After considering the evidence submitted at oral argument and in the parties' filings, the Court FINDS that Plaintiff has not produced sufficient evidence to make a *prima facie* claim for retaliation. In fact, the only evidence Plaintiff submitted on his retaliation claim was a vague comment by one of his superiors. Accordingly, Plaintiff has no evidence of a causal connection between his protected activity and any alleged adverse employment action.

To establish a *prima facie* case of disparate impact discrimination, Plaintiff must identify specific practices responsible for any observed disparities and must conduct a systematic analysis of those employment practices. *See Fuller v. General Cable Indus.*, 81 F.Supp.2d 726, 728 (E.D. Tex.2000). In doing so, Plaintiff must provide sufficient evidence to raise an inference of causation. *See id.* If

Plaintiff succeeds in making such a showing, Defendant, to be free of liability, must then demonstrate that the challenged practice is justified by business necessity. *See Page v. U.S. Indus., Inc.*, 726 F.2d 1038, 1053 (5th Cir. 1984). If Defendant rebuts the *prima facie* case by showing the challenged practices to be job-related, Plaintiff may still prevail by showing a less discriminatory alternative. *See id.*

In the present case, Plaintiff cannot establish a *prima facie* case, because he fails to go beyond the bald assertion that he is not aware of any African-American males filling supervisory or managerial positions in Defendant's Orange Technology Lab. Plaintiff's disparate impact claim shows no causal connection between the alleged imbalance of African-American males in supervision or management and the alleged practices or policies at issue in this lawsuit. *See, e.g., Scales v. Slater*, 181 F.3d 703, 708 (5th Cir. 1999). Plaintiff's sole contention that there is under representation of African-American males in management or supervision, without more, is insufficient to establish a *prima facie* disparate impact claim. As such, the Court FINDS there is no genuine issues of material fact with respect to Plaintiff's disparate impact claim.

The Court need not address Plaintiff's hostile work environment claim because Plaintiff conceded at the hearing that he had not satisfied the administrative prerequisites.

IV. CONCLUSION

For the reasons set forth above, the Court finds that Plaintiff has not come forward with genuine issues of material fact sufficient to survive summary judgment. Consequently, Defendant is entitled to judgment as a matter of law on all Plaintiff's claims. Because Plaintiff cannot survive summary judgment on his substantive claims, the Court need not address Plaintiff's request for punitive damages.

IT IS THEREFORE ORDERED that *Defendant's Opposed Motion for Complete Summary Judgment* (Doc. No. 77) is, in all things, GRANTED.

IT IS FURTHER ORDERED that Plaintiff's cause of action is DISMISSED with prejudice.

IT IS FURTHER ORDERED that all motions not previously ruled on are DENIED AS MOOT, and each side shall bear their own costs and expenses.

Finally, the Clerk of the Court may CLOSE the above-styled and numbered cause of action.

SO ORDERED.

Signed this the 6th day of September, 2001.

/s/ Thad Heartfield
THAD HEARTFIELD
UNITED STATES DISTRICT JUDGE

APPENDIX D

STATUTES AND REGULATIONS

TITLE 42. THE PUBLIC HEALTH AND WELFARE CHAPTER 126. EQUAL OPPORTUNITY FOR INDIVIDUALS WITH DISABILITIES EMPLOYMENT

42 USCS § 12117 (2003)

§ 12117. Enforcement

(a) Powers, remedies, and procedures. The powers, remedies, and procedures set forth in sections 705, 706, 707, 709, and 710 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9) shall be the powers, remedies, and procedures this title provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this Act, or regulations promulgated under section 106 [42 USCS § 12116], concerning employment.

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 21. CIVIL RIGHTS EQUAL EMPLOYMENT OPPORTUNITIES

42 USCS § 2000e-5 (2001)

§ 2000e-5. Enforcement provisions

(a) Power of Commission to prevent unlawful employment practices. The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 703 or 704 of this title [42 USCS §§ 2000e-2 or 2000e-3].

(b) Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent; contents of notice; investigation by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause. Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such

form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d). If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d), from the date upon which the Commission is authorized to take action with respect to the charge.

(c) State or local enforcement proceedings; notification of State or local authority; time for filing charges with Commission; commencement of proceedings. In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal

proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) [(b)] by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(d) State or local enforcement proceedings; notification of State or local authority; time for action on charges by Commission. In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency.

(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this title [42 USCS §§ 2000e *et seq.*] (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

FEDERAL REGULATIONS

TITLE 29 LABOR
SUBTITLE B—REGULATIONS RELATING TO LABOR
CHAPTER XIV—EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
PART 1601—PROCEDURAL REGULATIONS
SUBPART B—PROCEDURE FOR THE PREVENTION OF UNLAWFUL EMPLOYMENT PRACTICES

29 CFR 1601.12

§ 1601.12 Contents of charge; amendment of charge.

(a) Each charge should contain the following: (1) The full name, address and telephone number of the person making the charge except as provided in § 1601.7;

(2) The full name and address of the person against whom the charge is made, if known (hereinafter referred to as the respondent);

(3) A clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices: *See* § 1601.15(b);

(4) If known, the approximate number of employees of the respondent employer or the approximate number of members of the respondent labor organization, as the case may be; and

(5) A statement disclosing whether proceedings involving the alleged unlawful employment practice have been commenced before a State or local agency charged with the enforcement of fair employment practice laws and, if so, the date of such commencement and the name of the agency.

(b) Notwithstanding the provisions of paragraph (a) of this section, a charge is sufficient when the Commission receives from the person making the charge a written statement

sufficiently precise to identify the parties, and to describe generally the action or practices complained of. A charge may be amended to cure technical defects or omissions, including failure to verify the charge, or to clarify and amplify allegations made therein. Such amendments and amendments alleging additional acts which constitute unlawful employment practices related to or growing out of the subject matter of the original charge will relate back to the date the charge was first received. A charge that has been so amended shall not be required to be redeferred.

TITLE 29—LABOR

SUBTITLE B—REGULATIONS RELATING TO LABOR
CHAPTER XIV—EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
PART 1601—PROCEDURAL REGULATIONS
SUBPART B—PROCEDURE FOR THE PREVENTION OF UNLAWFUL EMPLOYMENT PRACTICES PROCEDURE FOLLOWING FILING OF A CHARGE

29 CFR 1601.21

§ 1601.21 Reasonable cause determination: Procedure and authority.

* * * *

(b) The Commission shall provide prompt notification of its determination under paragraph (a) of this section to the person claiming to be aggrieved, the person making the charge on behalf of such person, if any, and the respondent, or in the case of a Commissioner charge, the person named in the charge or identified by the Commission in the third party certificate, if any, and the respondent. The Commission may, however, on its own initiative reconsider its decision or the determination of any of its designated officers who have authority to issue Letters of Determination, Except that the Commission will not reconsider determinations of reasonable cause previously issued against a government, governmental entity or political subdivision after a failure of conciliation as set forth in § 1601.25.

(1) In cases where the Commission decides to reconsider a dismissal or a determination finding reasonable cause to believe a charge is true, a notice of intent to reconsider will promptly issue. If such notice of intent to reconsider is issued within 90 days from receipt of a notice of right to sue and the charging party has not filed suit and did not receive a notice of right to sue

pursuant to § 1601.28(a)(1) or (2), the notice of intent to reconsider will vacate the dismissal or letter of determination and revoke the notice of right to sue. If the 90 day period has expired, the charging party has filed suit, or the charging party had requested a notice of right to sue pursuant to § 1601.28(a)(1) or (2), the notice of intent to reconsider will vacate the dismissal or letter of determination, but will not revoke the notice of right to sue. After reconsideration the Commission will issue a determination anew. In those circumstances where the notice of right to sue has been revoked, the Commision will, in accordance with § 1601.28, issue a notice of right to sue anew which will provide the charging party with 90 days within which to bring suit.

* * * *

APPENDIX E

Equal Employment Opportunity Commission

DISMISSAL AND NOTICE OF RIGHTS

To:	From:
Mr. Ronald Manning 4390 Ector Ave. Beaumont, Tx 77705	Equal Employment Opportunity Commission Houston District Office 1919 Smith, 7th Floor Houston, Texas 77002

[ ] *On behalf of a person aggrieved whose identity is CONFIDENTIAL (29 CFR §§ 1601.7(a))*

Certified Mail No. P 559 717 989

Charge No.	EEOC Representative	Telephone No.
330990188	Charles McConnell, Supervisor	(713) 209-3380

(See the additional information attached to this form.)

YOUR CHARGE IS DISMISSED FOR THE FOLLOWING REASON.

[ ] The facts you allege fail to state a claim under any of the statutes enforced by the Commission.

[ ] Respondent employs less than the required number of employees.

[ ] Your charge was not timely filed with the Commission, *i.e.*, you waited too long after the date(s) of the discrimination you alleged to file your charge. Because it was filed outside the time limit prescribed by law, the Commission cannot investigate your allegations.

[ ] You failed to provide requested information, failed or refused to appear or to be available for necessary interviews/conferences, or otherwise refused to cooperate to the extent that the Commission has been unable to resolve your charge. You have had more than 30 days in which to respond to our final written request.

[ ] The Commission has made reasonable efforts to locate you and has been unable to do so. You have had at least 30 days in which to respond to a notice sent to your last known address.

[ ] The respondent has made a reasonable settlement offer which affords full relief for the harm you alleged. At least 30 days have expired since you received actual notice of this settlement offer.

[X] The Commission issues the following determination: Based upon the Commission's investigation, the Commission is unable to conclude that the information obtained establishes violations of the statutes. This does not certify that the respondent is in compliance with the statutes. No finding is made as to any other issues that might be construed as having been raised by this charge.

- NOTICE OF SUIT RIGHTS -

[X] Title VII and/or the Americans with Disabilities Act: This is your NOTICE OF RIGHT TO SUE. If you want to pursue your charge further, you have the right to sue the respondent(s) named in your charge in U.S. District Court. If you decide to sue, you must sue WITHIN 90 DAYS from your receipt of this Notice; otherwise your right to sue is lost. WITH THE ISSUANCE OF THIS NOTICE OF RIGHT TO SUE, THE COMMISSION IS TERMINATING ITS PROCESS WITH RESPECT TO THIS CHARGE.

[ ] Age Discrimination in Employee Act: This is your NOTICE OF DISMISSAL OR TERMINATION. If you want to pursue your charge further, you have the right to sue the respondent(s) named in your charge in U.S. District Court. If you decide to sue, you must sue WITHIN 90 DAYS from your receipt of this Notice; otherwise your right to sue is lost. WITH THE ISSUANCE OF THIS NOTICE OF RIGHT TO SUE, THE COMMISSION IS TERMINATING ITS PROCESS WITH RESPECT TO THIS CHARGE.

[ ] Equal Pay Act (EPA): EPA suits must be brought within 2 years (3 years for willful violations) of the alleged EPA underpayment.

On behalf of the Commission

/s/ Charles M. McConnell
for H. JOAN EHRLICH
DISTRICT DIRECTOR

11/26/99
(Date)

cc: Mr. James R. Chandler
Human Resources Manager
Chevron Chemical Company
P.O. Box 7400
Orange, TX 77631-7400
RESPONDENT CONTACT PERSON

Enclosures
Information Sheet
Copy of Charge

EEOC Form 161 (Test) 5/95)
CHEVRON 0398

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974: See Privacy Act Statement before completing this form.

Agency ___FEPA _X_EEOC

Charge Number
Amended:
330990188

Texas Commission on Human Rights and EEOC
State or local Agency, if any

Name: Mr. Ronald H. Manning

Home Telephone: (409) 835-5906

Street Address: 4390 Ector Ave., Beaumont, TX 77705

Date of Birth: 01/16/50

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME.

Name: CHEVRON CHEMICAL COMPANY

Number of Employees, Members: Cat D (501+)

Telephone: (409) 886-7491

Street Address: P.O. Box 7400, Orange, TX 77631-7400

County: 245

CAUSE OF DISCRIMINATION BASED ON

_X_ Race _X_ Sex _X_ Retaliation _X_ Disability

Date Discrimination Took Place: 06/16/98

The Particulars Are:

I. On June 16, 1998, I was denied a promotion to the position of molding group t-1 and to the position of pipe/PDG group t-1.

II. I was informed of the selections verbally and via memo from my immediate supervisor.

III. I believe that i have been denied a promotion because of my race, black, my gender, male and in retaliation for filing previous charges of discrimination against Chevron, in violation of Title VII of the Civil Rights Act of 1964, as amended. No black males have ever been promoted to the T-1 position since 1989, when the position was implemented.

IV. I wish to amend the charge to include being denied promotion because of disability, as defined by, and covered under, the Americans with Disabilities Act.

/s/ Ronald H. Manning	11/20/99	CHEVRON 0424
Signature	Date	

☐ I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or telephone number and cooperate fully with them in the proceeding of my charge in accordance with their procedures.

I declare under penalty of perjury that the foregoing is true and correct.

I swear of affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT

/s/ Ronald H. Manning

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE

26 Oct. 1998

[LOGO] Chevron

Chevron Chemical Company LLC
P.O. Box 7400
Orange, TX 77631-7400
Phone 409 886 7491

November 15, 1999

Mr. Cleveland Hopwood
Investigator
U.S. Equal Employment Opportunity Commission
Houston District Office
1919 Smith St., 7th Floor
Houston, TX 77002-8049

Orange Plant

Re: Charge Number 3309901888
Charging Party Ronald H. Manning

Dear Mr. Hopwood:

This letter will acknowledge my phone conversation with you on Friday, November 12, 1999 in which I responded to the questions included in your October 28, 1999 letter to James R. Chandler.

Following are your questions and the responses that were provided:

> Please provide me with each individual score given by each of the Selection Team members for each job selection criteria. I need to know how each member individually ranked the Charging Party, and the other candidates. If each evaluator completed a separate Candidate Evaluation Form, submit copies."

Response:

> Please refer to our December 14, 1998 position statement on Mr. Manning's above-referenced charge. Exhibit I of our position statement provides the Chevron Chemical Company Job Selection Process. The last

page of Exhibit I under XIV—Select Final Candidate states that the team will assess the relative skills, knowledge and experience of each candidate against the selection criteria communicated in the Job Announcement. *The team will reach a consensus decision.* This was done in filling the Molding T1 job and the Pipe/PDG job. The candidate results are shown in Exhibit II of the position statement. Each evaluator (team member) did not complete a separate Candidate Evaluator Form.

Also, in our position statement, you will find comments from the selection team as to why Mr. Manning received the ratings that he did on each of the Job Selection Criteria.

If you have any further questions, please contact me at (409) 882-6274.

Sincerely,

/s/ Randall R. Martin
RANDALL R. MARTIN
Human Resources Business Partner

CHEVRON 0403

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
[SEAL] Houston District Office

1919 Smith St. 7th Floor
Houston, TX 77002-8049
PH: (713) 209-3320
TDD: (713) 209-3439
FAX: (713) 209-3381
LEGAL: (713) 209-3401

CLEVELAND HOPWOOD
DIR. LINE: (713) 209-3319

October 28, 1999

Mr. James R. Chandler
Human Resources Manager
Chevron Chemical Company
P.O. Box 7400
Orange, Texas 77631-7400

Re: Charge Number: 330 99 0188
Charging Party: Ronald H. Manning

Dear Mr. Chandler:

Pursuant with the continuation of the investigation of the above cited charge, I request that you provide the following information on or before November 16, 1999:

You provided the overall evaluation scores for the candidates which reflects the Charging Party attained the lowest scores. I will need more specific information. Please provide me with the each individual score given by each of the Selection Team members for each job selection criteria. I need to know how each member individually ranked the Charging Party, and the other candidates. If each evaluator completed a separate Candidate Evaluation Form, submit copies.

If you have any questions, please contact me, Cleveland Hopwood, Investigator, at (713) 209-3319.

Sincerely,

/s/ Cleveland Hopwood
CLEVELAND HOPWOOD

CHEVRON 0404

U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Houston District Office

1919 Smith, 7th Floor
Houston, TX 77002-8049
PH: (713) 209-3320
TDD: (713) 209-3439
FAX: (713) 209-3381
LEGAL: (713) 209-3401

CERTIFIED RECEIPT NO: Z 259 282 131

Mr. Ronald H. Manning
4390 Ector Avenue
Beaumont, Texas 77705

Charging Party

Mr. R.A. Walker
Chevron Chemical Company
P.O, Box 7400
Orange, Texas 77631-7400

Respondent

Charge No.: 330 99 0188

RECONSIDERATION OF DISMISSAL
AND NOTICE OF RIGHTS

Pursuant to the authority vested in me under Section 1601.21(b)(1) of the Equal Employment Opportunity Commission's Procedural Regulations, I hereby vacate and revoke the Dismissal and Notice of Rights dated July 6, 1999, which was issued on the above referenced charge. In those circumstances where the Dismissal and Notice of Rights has been revoked, the Commission will, in accordance with 1601.28, issue a Dismissal and Notice of Rights anew which will provide the Charging Party with 90 days within to bring suit.

This letter will serve as notice that the Investigation of the above numbered charge will continue. If you have any

questions regarding this matter, please contact Mr. Javier Chacon, Deputy Director, at the address given above or by telephone at (713) 209 -3376.

On behalf of the Commission:

10/6/99
Date

/s/ Javier Chacon
for H. Joan Ehrlich
District Director

CC: Victoria L. Plante - Charging Party Attorney
Attorney At Law
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September 30, 1999

H. Joan Ehrlich, District Director
EEOC - Houston District Office
1919 Smith, 7th Floor
Houston, Texas 77002

RE: Ronald Manning; Charge No. 330990188

Dear Ms. Ehrlich:

I have been retained by Ronald Manning to represent him in a discrimination claim against Chevron Chemical Company. Mr. Manning received his right to sue letter from the EEOC on or about July 8, 1999.

Per my telephone conversation with Rose Mendez on September 29, 1999, wherein she advised me to write you a letter requesting that the charge of discrimination and the right to sue letter in the above referenced matter be amended, I request that the charge and right to sue letter be amended to include a cause of action pursuant to the Americans with Disabilities Act.

Mr. Manning initially consulted with me and retained my services on September 27, 1999. During the consultation, I became aware that Mr. Manning has a severe stuttering problem. I advised him of his right not to be discriminated against because of a speech impediment. He was totally unaware of his rights under the ADA because he did not know that stuttering may be a disability. Therefore, he did not include this violation in his charge. Chevron submitted information to the EEOC that Mr. Manning was a "stutterer." Chevron also recognized stuttering as an ADA disability.

In Mr. Manning's twenty-two (22) years of employment with Chevron, he has never received a promotion. Mr. Manning has been interviewed for numerous positions, but believes that the stigma and stereotype associated with severe stuttering has affected hiring personnel decisions to promote him. Because he cannot speak as other applicants, stereotypical views of stuttering, such as ignorance and lack of authoritativeness, have affected and will continue to affect promotion decisions.

The information submitted by Chevron during the EEOC investigative period, gives information reasonably related to potential violations of the ADA. Specifically, Chevron responds to Mr. Manning's charge that he was unlawfully denied promotion by stating, "Ron's answers to some of the interview questions tended to ramble and he repeated himself several times on answers to questions." Based on his score in the interview process, Mr. Manning was not offered one of the two positions.

Mr. Manning is a competent and intelligent employee. He has a BBA in Marketing and is qualified to carry out the essential functions of the position. However, because he is not able to speak without repeating himself or stuttering, he has been discriminated against on the basis of this disability as well as his race and gender.

I am in the process of drafting Mr. Manning's original complaint regarding violations of Title VII, discrimination based on race and gender, as well as his retaliation claim. I would like to include his ADA claim as well. However, I need a right to sue letter that gives Mr. Manning permission to sue under the ADA.

I am aware that Mr. Manning may amend his charges. Please advise me of the steps I need to take in order to have Mr. Manning's right to sue and charge of discrimination amended to include an ADA claim.

Thank you for your prompt attention to this matter. I look forward to hearing from you.

Sincerely,

/s/ Victoria L. Plante
Victoria L. Plante

cc: Ronald Manning